Federal Communications Commission
Washington, D.C. 20554

June 14, 2007

David L. Sieradzki
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Re: Motion to Accept Filing as Timely
Filed in CC Docket No. 96-45
Filed in WC Docket No. 05-337

Dear Mr. Sieradzki:

The Office of the Secretary has received your request for acceptance of the document filed by DialToneServices, L.P. and Alltel Corporation in the above-referenced proceedings as timely filed, due to technical difficulties with the Commission's Electronic Filing System.

In accordance with 47 C.F.R. Section 0.231(i), I have reviewed your request and verified your assertions. After considering the relevant arguments, I have determined that these filings will be accepted as timely filed on June 6, 2007. If we can be of further assistance, please contact the Office of the Secretary.

Sincerely,

Marlene H. Dortch
Secretary

MHD/gt

cc: Wireline Competition Bureau

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June 8, 2007

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Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Federal-State Joint Board on Universal Service; CC Docket No. 96-45
High Cost Universal Service Support; WC Docket No. 05-337

Dear Ms. Dortch:

On behalf of Alltel Corp., I am transmitting via ECFS Alltel's Comments on WC Docket No. 05-337 and CC Docket No. 96-45, in response to the Notice of Proposed Rulemaking, FCC 07-88 (released May 14, 2007), issued in these two dockets. This transmittal includes four separate Adobe Acrobat files: this cover letter, the Comments, and two Exhibits.

I attempted to file these comments via ECFS on June 6, 2007, but the system was not functioning properly. Instead, on that date I submitted the filing by e-mailing it to you and a number of other staff members in the Office of the Secretary and the Wireline Competition Bureau. I respectfully request that this be treated as timely filed in both of these dockets by the June 6 deadline.

Please contact me with any questions. Thank you very much.

Respectfully submitted,

David L. Sieradzki

Enclosure

Proceeding: FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

ALLTEL COMMENTS

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June 6, 2007

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

ALLTEL COMMENTS

Alltel Corporation ("Alltel") submits these comments on the Notice of Proposed Rulemaking ("NPRM"), FCC 07-88 (released May 14, 2007), which seeks comment on the Joint Board's Recommended Decision ("RD"), FCC 07J-1 (released May 1, 2007), proposing a cap on high-cost funding to competitive providers of universal service. The proposed cap is anti-consumer, depriving rural areas of access to services comparable to those available in urban areas; violates well-established Commission and court precedent mandating competitive neutrality; and does not further the goals of universal service. For all of these reasons, the Commission should not follow the seriously-flawed RD, but should instead proceed to rational, comprehensive, and long-term universal service reform measures under consideration by the Joint Board.

In these comments, we demonstrate the lack of any legal or rational support for the Joint Board's proposal to impose a funding cap only upon to competitive eligible telecommunications carriers ("CETCs"). We show that the Act and an unbroken line of precedents mandate the competitive neutrality principle – and its necessary corollary, funding portability and equal treatment of consumers, whether they subscribe to CETC or incumbent local exchange carrier ("ILEC"). We explain why the RD's proposal departs from this statutory mandate and harms

consumers, who reap major benefits from a competitively neutral universal service program. Finally, we address the specific questions raised in the RD and the NPRM about the mechanics of a cap, the base period, the duration, and related matters.

Numerous members of Congress, state, tribal and local officials, community leaders, and consumers have expressed serious concerns or opposition to the RD's CETC-only funding cap proposal. **Exhibit 1** provides examples of some of these compelling and heartfelt letters. Adoption of the RD's supposedly "interim" measure would interfere with achieving what should be the Commission's main goal – to develop comprehensive solutions to reform and modernize the high-cost universal service program in the long term.[1]

I. THE PROPOSED CAP ON CETC FUNDING IS UNLAWFUL

The Act intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans" – not just those who happen to live in urban areas – "by opening all telecommunications markets" – including rural markets – "to competition."[2] The members of Congress who were responsible for the 1996 Act continue to emphasize that competition can and must co-exist with universal service.[3]

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[1] *See* RD, Dissenting Statement of Commissioner Michael Copps.

[2] Telecommunications Act of 1996, Conference Report, S.652, H.R. Rpt. 104-458, at 1 (Jan. 31, 1996).

[3] *See, e.g.,* Communications Opportunity, Promotion and Enhancement Act, H.R.5252, Senate Report, (Sept. 30, 2006) ("Competitive neutrality [in the context of universal service disbursements] means that the Commission should not unfairly favor one technology or provider over another. For example, the Commission should not favor wireline providers over wireless providers."); Universal Service Reform Act of 2007, H.R. 2054 (introduced Apr. 26, 2007 by Rep. Boucher and 9 co-sponsors) ("Federal and State mechanisms to preserve and advance universal service should be competitively neutral, so that those mechanisms neither unfairly advantage nor disadvantage one communications service provider over another, and neither unfairly favor nor disfavor one technology over another."). *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, ¶ 50 (1997) ("First Report and Order") (emphasis added; subsequent history omitted) (parties who contend that "in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service... present a false choice between competition and universal service.").

The RD's proposed cap on CETC support violates the statutory principle of competitive neutrality and cannot be lawfully be adopted, even on a supposedly "interim" basis. The RD's proposal would ensure that CETCs receive less support than ILECs even when they provide the same supported services to the identical customers.[4] Thus, support would no longer be portable: if a rural customer migrates service from an ILEC to a CETC, less high-cost support would be available to serve that customer – giving the ILEC an artificial, regulatory-induced competitive advantage over the CETC. We show below that none of the RD's purported justifications for this discriminatory proposal have any merit. We also show that fund portability is necessary and indispensable to satisfy the competitive neutrality requirement of the Telecommunications Act of 1996 ("Act"), and to protect the interests of rural consumers.

A. There Is No Fund Growth "Emergency" Justifying A Gross Violation of the Competitive Neutrality Requirement

The RD indicates that "immediate action" (¶ 5) to impose a so-called "interim, emergency cap" (¶ 1) is needed to address the supposedly "dire" (¶ 4), "unsustainable" (¶ 4), and "dramatic" (¶ 5) growth of high-cost support for CETCs, and characterizes this situation as a "crisis" (¶ 8). Aside from its inflammatory rhetoric, however, the RD offers no reliable quantitative support for its assertions regarding fund growth. Moreover, the RD apparently relies on data and calculations that have been withheld from the public, which means that commenting parties have no opportunity to review or address this core basis for the proposed precipitate action. And the characterization of the cap as "interim" or "emergency" is highly questionable.

[4] The RD proposes to reduce CETC per-line support below the amount that ILECs would continue to receive, using a "state reduction factor" that would bring total CETC funding down to 2006 levels in each state. RD, ¶ 10.

1. The Shift of Consumer Demand from ILECs to Wireless CETCs is a Beneficial Long-Term Trend, Not a "Crisis"

There is no fund growth "emergency" that would justify a "two-minute drill" style rush to judgment to adopt a proposal that would violate established law and over a decade of unbroken precedents. It has been apparent for several years that consumers want more than plain old telephone service ("POTS"), and they are choosing to subscribe to wireless service – while incumbent carriers' line counts are shrinking. Rural consumers' increasing access to mobile wireless services, and their choice to use such services, clearly are in the public interest, as discussed further in section II below. It also has been obvious for several years that wireless carriers and other new competitive entrants are obtaining access to high-cost universal service support that had been withheld from them in the past.[5] These trends have been noted in a number of FCC and Joint Board documents issued over the past 5 years.[6] There is nothing new, "explosive," or "dramatic" that will happen within the next six months, by which time the Joint Board supposedly will resolve the longer-term problems of the high-cost fund.[7]

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[5] But competitive carriers still receive only approximately 1/3 of the support received by incumbent local exchange carriers, even though competitive carriers serve 228,604,000 customers and incumbent local exchange carriers serve 143,766,000 customers. *See* RD, App. B; *Local Telephone Competition: Status as of June 30, 2006* (FCC WCB, Industry Analysis and Technology Div., released Jan. 31, 2007).

[6] *See, e.g., Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Wireless Services*, Eleventh Report, 21 FCC Rcd 10947 (2006). Notably, that report demonstrates the major progress that wireless carriers are making in bringing broadband services to rural consumers. *See id.*, Statement of Commissioner Deborah Taylor Tate ("I also am particularly pleased that this report highlights the growth of broadband data services provided by wireless providers.... It is important to see that wireless broadband continues to develop in order to present an additional viable option to consumers, not only in core 'lead' markets, but across the entire nation... Wireless providers will be critical to getting broadband out to that last, most difficult mile."

[7] *See* RD, ¶ 1. There is certainly no "emergency" that will occur within the next month or two that would justify the extraordinarily truncated comment cycle established in the NPRM (¶ 6) – which in essence, ignores public input and indicates that the Commission does not intend to take seriously the grave concerns about the so-called "interim" cap proposal expressed by public officials and consumers from all regions of the country.

2. The Quantitative Assertions Relied Upon in the RD are Based on Unsupported Data and Calculations

The RD baldly asserts that "competitive ETC support in 2007 will reach at least $1.28 billion if the Commission takes no action to curtail this growth." ¶ 4. But the RD contains no footnotes citing any data, from USAC or any other source, and does not provide any basis for any calculations, to justify this claim. Alltel not been able to replicate this calculation based on publicly available USAC data. The RD contends that "if the Commission were now to approve all competitive ETC petitions currently pending before the Commission, high-cost support for competitive ETCs could rise to as much as $1.56 billion in 2007." *Id.* Again, the RD offers no data to support this assertion.[8]

Egregiously, the Joint Board apparently relies heavily on four graphical charts purporting to show rapid growth in CETC support. RD, Appendix A. Not only do these charts fail to provide the basis for the demonstrated numbers, they do not even disclose what the numbers are. The charts are presented with fuzzy lines at very low levels of resolution, which make it difficult to ascertain what the actual numbers are for the data and projections on which the RD proposal relies. Thus, it is impossible for parties to this proceeding to verify or comment on these data.

The Commission is obligated to seek public comment on underlying data relied upon to develop a numerical threshold rule. For example, the Third Circuit, in its decision reviewing the Commission's media ownership rules, determined that the Commission was required to seek public comment on the underlying data for the formation of the Diversity Index. "As the

[8] There is also no basis for hypothesizing that the Commission would approve all CETC designation petitions currently pending. Over the past 2 years, the Commission has granted no more than 5 such petitions; over 20 petitions remain pending, some for over 5 years. The Commission is failing to live up to its "commitment to resolve, within six months of the date filed at the Commission, all designation requests for non-tribal lands that are properly before us pursuant to section 214(e)(6)." *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, 15 FCC Rcd 12208, ¶ 114 (2000) ("*Twelfth Report and Order*"). These "indefinite delays in the designation process thwart the intent of Congress, in section 254, to promote competition and universal service to high-cost areas." *Id.*

Diversity Index's numerous flaws make apparent, the Commission's decision to withhold it from public scrutiny was not without prejudice."[9] It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of data that, in critical degree, are known only to the agency.[10]

3. CETC Fund Growth Is Not The Main Cause of Recent Increases in the Contribution Factor

Contrary to the somewhat misleading portrayal in the RD, the recent increase in the universal service contribution factor is not an "emergency" or "crisis" driven by growth in CETC funding. In fact, the latest increase was caused primarily by unrelated factors. The RD states that "without immediate action to restrain growth in competitive ETC funding, the federal universal service fund is in dire jeopardy of becoming unsustainable." ¶ 4. In support of this "unsustainable" contention, the RD notes that "[t]he most recent contribution factor is 11.7%, which is the highest level since its inception." *Id.*, n.11. The clear impression created is that this growth in funding is the primary factor driving the increase in the contribution factor. But in response to questioning from Chairman Edward Markey of the House Energy & Commerce Committee, Chairman Kevin Martin conceded that the growth of high-cost funding – to all carriers, not just CETCs – is a relatively minor factor in the most recent increase in the contribution factor.[11]

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[9] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 412 (3d Cir. 2004).

[10] *See McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) (failure to describe a particular "model" for computing contamination levels was not adequate notice); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir.1977) (agency's failure to provide notice of the data from which it derived regulation foreclosed "criticism of the methodology used or the meaning to be inferred from the data"); *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance.").

[11] *See* Chairman Kevin Martin Responses to Chairman Markey's April 2, 2007 Letter (May 17, 2007) (Q: "(1) Please identify what you believe to be the root cause for this significant increase in the contribution factor." A: "Several factors contributed to the two percent increase of the contribution factor for the second quarter of 2007. The largest single factor was prior period adjustments that acted to reduce the Universal Service Fund's revenue

A more significant factor driving undue growth in the fund is the fact that ILECs currently are rewarded for losing customers by maintaining their overall support levels.[12] This results in higher per line support per those customers that continue to be served and the universal service fund is unnecessarily inflated by the increased per line support amounts for both ILECs and CETCs. Had the FCC implemented a freeze on the level of per-line support to all ETCs by study area in 2003 (as Alltel advocated then and continues to advocate now), then the overall high-cost fund size today would be reduced by approximately 26.5%, which would have completely eliminated any potential argument regarding a "crisis" in funding growth.[13] Such a competitively neutral approach – unlike the RD's proposed CETC-only cap – also would avoid depriving consumers of support for the development and expansion of services in rural areas that is comparable to the services available today in urban areas. This would be consistent with the defined purpose of universal service.

4. The Proposed Cap Is Not Really "Interim"

Even if an "emergency" could be demonstrated to justify an "interim" or "temporary" rule, the RD's characterization of the proposal as "interim" or "temporary" is simply not

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requirements in previous quarters. Specifically, these prior period adjustments arose from additional contributions made by AT&T and Verizon on past under-reported revenue, and from a change in the amount of funds that the Universal Service Administrative Company held in reserve for bad debts. The absence of these prior period adjustments caused a 1.5 percent increase in the contributions factor. The remaining 0.5 percent of the increase was due to reductions in the funding base, increases in program demand, including for high-cost support.")

[12] The current approach inexplicably runs counter to the FCC's considered decision in 1997 that " if an incumbent LEC loses a customer to a competitive eligible telecommunications carrier, the incumbent LEC will lose some or all of the per-line level of support that is associated with serving that customer.... [W]hen a competitive eligible telecommunications carrier receives support for a customer pursuant to section 54.307(a)(4), the incumbent LEC will lose the support it previously received that was attributable to that customer." *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, ¶ 84 (1997).

[13] *See* Western Wireless Corp. Reply Comments, CC Docket No. 96-45 (filed June 3, 2003), at 29-33. In 2003, ILEC high cost support was approximately $3,141,000,000 for 171,458,000 ILEC lines, or $18.32 per line. The projected 2007 level of support for ILECs is $3,177,000,000 for 137,052,000 supported lines or $23.18 per line. (These data are drawn from USAC reports.) This 26.5% growth in per line support from $18.32 to $23.18 per line today, due to the failure to reduce support when customers leave the ILEC, has been entirely unjustified and unnecessary.

credible. There is every reason to believe that the plan, if adopted, would remain in effect far longer than 18 months. Alltel avidly hopes that the Joint Board will actually reach a resolution to the comprehensive problems with the high-cost fund within 6 months.[14] But as Commissioner Copps noted in his dissent to the RD, a funding cap could well remain in place for a significantly longer period of time.

In Commissioner Copps' words, "even if the Joint Board acts within six months on fundamental reforms and the FCC then proceeds to adopt some version of those reforms in a year, it will be 18 months – autumn of 2008 – before we even have a strategic long-term plan from the FCC for universal service reform. If the past is prologue, coming to FCC consensus may take far longer than that, not to mention any legislative changes that may be suggested."[15] The Commission and the Joint Board have been wrestling with the large-scale problems of the high-cost fund for over 10 years, and the Public Notices and Referrals upon which the current RD are based go back at least 5 years.[16]

The last time the Commission imposed a supposedly "interim" cap on universal service distributions – the cap on the HCL funding mechanism, proposed in 1993 and implemented in 1994 – it committed to leave that cap in place for only two years, pending resolution of "a rulemaking on the full range of USF issues."[17] But that "interim" cap remained in place for over

[14] *Cf. Twelfth Report and Order* , ¶ 114 (committing to address ETC petitions within 6 months of filing); *see supra*, note 8.

[15] RD, Dissenting Statement of Commissioner Michael Copps. *See also* Letter from Senators Rockefeller, Pryor, Dorgan, Klobuchar, and Smith, to Commissioner Tate and Commissioner Baum (Mar. 21, 2007) ("We also believe that a cap, especially one imposed only on certain carriers, would not provide incentives to all stakeholders to engage in thoughtful negotiations on how to best reform the USF. Although the cap is reported to be only a temporary cap, we are concerned that it would become a de facto permanent cap. Unless all recipients have an incentive to find solutions to controlling the growth of the USF, we do not believe that the Joint Board or the FCC would ever be able to adopt measures to reform and modernize the administration of the USF.").

[16] *See* RD, ¶¶ 2-3 (summarizing history of the current proceeding).

[17] The rules capping the growth of the HCL fund originally were proposed as "interim measures to moderate growth of the USF during the pendency of our broader USF rulemaking. These measures would be implemented through

13 years and, although modified somewhat in 2001, essentially is still in effect to this day. Other supposedly "interim" rules involving universal service and access charges also have remained in place for long periods of time; and neither the RD nor the NPRM contains any indication of a hard end-date by which the supposedly "interim" limitation on CETC funding will terminate.[18]

Finally, even if the plan were truly "interim," that would not exempt it from compliance with the law. "The Commission cannot expect to avoid judicial review so easily – especially when the 'interim' is measured in years .... Indeed, even an interim rule expected to be in place for only a brief time is subject to judicial review, or agencies would be free to act unreasonably for that time."[19]

B. The Recommended Decision's Purported Justifications For the CETC-Only Fund Cap Rely Upon Fallacious Public Policy Premises

The RD and the NPRM do not purport to modify the principle of competitive neutrality established pursuant to 47 U.S.C.§ 254(b)(7)[20] – nor would they have legal authority to do so, as

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the adoption of interim Part 36 rules of specific and limited duration. The interim rules would be in place for a two year period, beginning on January 1, 1994. We believe that two years should be sufficient to conclude a rulemaking on the full range of USF issues." *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 8 FCC Rcd 7114 (1993).

[18] The only "interim," "emergency" telecommunications rule in recent memory that turned out to be truly "interim" and expired as anticipated was the UNE/access charge rule, which was adopted with a "hard" sunset date of June 30, 1997 (10 months after the adoption of the order). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 725 (1996) ("*Local Competition Order*"), *affirmed in pertinent part, Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1075 (8th Cir. 1997). The Commission emphasized that "we believe it is imperative that this transitional requirement be limited in duration. We can conceive of no circumstances under which the requirement ... would be extended further." *Id.* The Commission also made it clear what rules would apply after the specified sunset date, and the C.F.R. rule was drafted to automatically expire as of the sunset date (*i.e.*, no further FCC action was required to eliminate the rule).

[19] *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 531 (D.C. Cir. 1996). *See also Union of Concerned Scientists v. Nuclear Reg. Comm'n*, 711 F.2d 370 (D.C. Cir. 1983); *Verizon California, Inc. v. Peevey*, 413 F.3d 1069, 1072-73 (9th Cir. 2005) (challenge to an "interim" rate was ripe for review); *id.* at 1077 (Bea, J., concurring) (the commission's "position largely boils down to the indefensible proposition that a state commission can insulate its 'determination[s]' from judicial review by labeling them 'interim.' This would eviscerate the judicial review provided by statute and cannot be, particularly in light of the fact that, as the history of this case demonstrates, so-called interim rates can remain in effect for years ... and can allegedly cause losses which are, and will be, uncompensable.").

[20] The RD also purports to continue applying technological neutrality: it rejects a wireline CETCs request to apply the cap only to wireless CETCs, saying, "We are not aware of anything in the Commission's current rules that

discussed below. However, the RD offers a few short sentences attempting to show why "an interim cap on high-cost support only for competitive ETCs would not violate the Commission's universal service principle of competitive neutrality." ¶ 6. These arguments do not withstand scrutiny.

1. Caps on ILEC Funding vs. Caps on CETC Funding

First, the RD is plainly wrong in stating that ILEC funding is already subject to caps, but CETC support is not. ¶ 5. Any existing caps on ILEC funding also control CETC funding to exactly the same extent, pursuant to the equal support rule. To the extent that the current rules limit growth in ILEC support per-line, they impose identical limits on the growth of CETC support. The proposed new cap on CETC funding improperly would cap CETC funding twice.

Moreover, most of the existing ILEC funding mechanisms are not subject to any type of cap. There is no cap on the growth of the High Cost Model-based ("HCM") funding disbursed to non-rural ILECs or the Interstate Common Line Support ("ICLS") and Local Switching Support ("LSS") funds disbursed to rural ILECs, but the RD proposes to restrict HCM, ICLS, and LSS funding to CETCs.

The proposed hard cap on CETC funding also is far more onerous than the adjustable, indexed cap on the High Cost Loop ("HCL") fund. Under the RD's proposal, HCL funds to CETCs would be strictly capped, but HCL funds to rural ILECs would continue to grow pursuant to a "Rural Growth Factor" equal to "the sum of the annual percentage change in the United States Department of Commerce's Gross Domestic Product – Chained Price Index (GPD-CPI) plus the percentage change in the total number of rural incumbent local exchange carrier working loops." 47 C.F.R. § 36.604. Rural ILECs also qualify for a "safety net additive" to increase

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provides a precedent for such a technology-based differentiation within universal service policy." ¶ 7. The Joint Board's inability to cite any precedent for a departure from technological neutrality is telling.

HCL support in calendar years when an unusually high investment is needed to ensure quality service to consumers. § 36.605. By contrast, the RD proposes not to index the CETC funding cap to inflation or any other growth factor, so that as inflation occurs, CETC funding in real dollars would actually shrink. RD, ¶ 13. Unlike the rural ILECs, CETCs would not be eligible for any "safety net" provision to account for the need for investments to satisfy their ETC obligations. The RD's proposal utterly fails to recognize the real-world impact the cap could have on rural CETCs and their customers.

2. "Cost-Based" Support

Second, the RD states that "incumbent rural LECs' support is cost-based, while competitive ETCs' support is not." ¶ 6. Notably, the RD does not contend that non-rural ILECs' HCM or Interstate Access Support ("IAS") funding mechanisms are cost-based, because they surely are not. But the RD would impose limits on CETCs' access to HCM and IAS funds that would not apply to the ILECs. The rural ILECs' ICLS fund is not strictly cost-based either: it was created merely to replace an inefficient, implicit subsidy that was formerly recovered through access charges.[21] And a cursory review of the intricate and arbitrary Part 36 rules, which govern the calculation of rural ILECs' HCL, LSS and ICLS funding pursuant to the existing rate of return system, reveals that there is at best only a tenuous relationship between these numbers and actual costs.[22] Fundamentally, as the U.S. Supreme Court has recognizes, "the 'book' value or embedded costs of capital presented to traditional ratemaking bodies often [bears] little resemblance to the economic value of capital."[23]

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[21] *MAG Order*, ¶ 128.

[22] 47 C.F.R. Part 36; §§ 54.303 & 54.305; Part 54 Subpart K.

[23] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 517-18 (2001); *see also id.* at 518 ("book costs may be overstated by approximately $5 billion); *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Services by Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, 18 FCC Rcd 18945, ¶ 27 (2003) ("In addition to the problems associated with reliance on incumbent

3. "Carrier of Last Resort" Obligations

Third, the RD indicates that the CETC-only funding cap could be justified because, it states, "competitive ETCs may not have the same carrier of last resort obligations that incumbent LECs have." This is simply untrue. Under 47 U.S.C. 214(e)(1), CETCs and ILECs have identical obligations to provide all of the supported services to all requesting customers throughout the designated service area – in effect, obligations akin to the "carrier of last resort" concept. Under § 214(e)(4), any carrier that attempts to relinquish its ETC status, whether ILEC or CETC, must obtain a state commission's advance approval in the event that no other ETCs are operating in the area. This is another indication that CETCs and ILECs are subject to similar obligations to be available as a "last resort." And any additional "carrier of last resort" obligations that may apply to ILECs at the state level (if any such obligations exist – the RD cites none) are related more to the ILECs historic status as monopoly utilities than to any "carrier of last resort" concept.

Moreover, even if the RD were correct in this regard, the remedy would not be to under-fund CETCs, but to subject them to the same "carrier of last resort" obligations as ILECs. The Commission has already done so, following the Joint Board's recommendation, in its 2005 *CETC Designation Framework Order*.[24] Indeed, the heightened requirements adopted for FCC-designated CETCs adopted in that Order go well beyond the degree of accountability imposed on ILECs in most jurisdictions.

LEC accounting records, the use of historical costs does not necessarily provide efficient investment signals to potential entrants. As many economists have noted, it is forward-looking costs, not historical costs, that are relevant in setting prices in competitive markets.")..

[24] *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371 (2005) ("*CETC Designation Framework Order*"); 47 C.F.R. §§ 54.202, 54.209.

4. Differences in Regulation of ILECs and CETCs

The RD notes that "[f]undamental differences exist between the regulatory treatment of competitive ETCs and incumbent LECs," such as differing equal access obligations and rate regulations. RD, ¶ 6. But the RD offers no explanation for why these differences, to the extent they exist,[25] would justify the proposed radical departure from the established principles of fund portability and competitive neutrality. In recent years, when confronted with situations in which more onerous regulatory requirements apply to one category of providers that offer comparable services to other less-regulated entities, the Commission's consistent remedy has been to reduce or eliminate such excessive requirements, rather than to heighten the regulatory differences.[26] Chairman Martin has correctly insisted that "the Commission must set the rules of the road so that players can compete on a level playing field. In other words, all providers of the same service should be treated in the same manner regardless of the technology that they employ."[27]

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[25] The RD does not address the fact that most ILECs are not subject to pervasive rate regulation; that the Commission is seriously considering the elimination of equal access requirements for ILECs; and that some CETCs do provide equal access and/or must certify their willingness to do so. 47 C.F.R. § 209(a)(8).

[26] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002), *aff'd, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005), *petitions for review pending, Time Warner Telecomms. v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005); United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, *Memorandum Opinion and Order*, 21 FCC Rcd 13281 (2006); Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd 5901 (2007); Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101 (2007).

[27] Statement of Chairman Kevin J. Martin, *Appropriate Regulatory Treatment of Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53 (released March 22, 2007).

To be sure, the Joint Board's and the Commission's concerns about the increasing size of the high-cost fund are legitimate. However, the Commission could address this problem and limit the growth of the fund without compromising competitive neutrality.[28] Although the FCC has considerable "statutory discretion to balance the multiple goals embodied in the Communications Act,"[29] it "must see to it that both universal service and local competition are realized."[30] The Commission "cannot flatly ignore or contravene [a] goal" specifically set forth in the Act.[31] To the extent that the FCC has reasonable options that would both control the size of the fund and preserve competitive neutrality, it may not ignore the second of these objectives, but instead must select a less restrictive alternative policy.

Some argue that disbursing high-cost support to CETCs has the improper effect of "supporting multiple competitors to serve areas in which costs are prohibitive for even one carrier."[32] With all due respect, this premise – which logically would lead to not only reducing, but eliminating, support for CETCs – is profoundly wrong.[33] Under this rationale, it would never

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[28] For example, CTIA, Alltel, consumer advocate Billy Jack Gregg, and many other parties offered alternative forms of funding caps that would apply to the entire industry, including competitive entrants, rather than protecting the status of the incumbent carriers and imposing all the burdens on new competitive entrants. *See* Letter from Gene DeJordy, Steve Mowery and Mark Rubin, Alltel (filed Feb. 16, 2007) (proposing a cap that would permit high-cost support to all ETCs (not just CETCs) to grow by no more than the inflation rate); *see also* funding growth limitation proposal offered by West Virginia consumer advocate and Joint Board member Billy Jack Gregg (Public Notice, *Federal-State Joint Board on Universal Service Seeks Comment on Proposals to Modify the Commission's Rules Relating to High-Cost Universal Service Support*, 20 FCC Rcd 14267 at Appendix B (reel. Aug. 17, 2005)); *Ex Parte* Communication of CTIA – The Wireless Association, at 2 (filed Jan. 24, 2007).

[29] *NARUC v. FCC*, 737 F.2d 1095, 1134 (D.C. Cir. 1984).

[30] *Alenco*, 201 F.3d at 615.

[31] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 322 (5th Cir. 2001).

[32] RD, Statement of Chairman Kevin Martin, at 1.

[33] The costs of providing both wireless and wireline service in rural areas certainly are higher than providing such services in urban areas; but this does not mean that those costs are "prohibitive" or that competition cannot coexist with universal service in these areas. In the absence of universal service support, some wireline and wireless telecommunications services probably would be provided to some extent in rural areas. But without support, both wireline and wireless services might not be provided to all requesting customers "throughout the service area," 47 U.S.C. § 214(e)(1), and would not be available in rural areas at a level that is "reasonably comparable to those services provided in urban areas, and ... at rates that are reasonably comparable to rates charged for similar services provided in urban areas." 47 U.S.C. § 254(b)(3).

be in the public interest for more than one ETC to receive support. But Congress specifically rejected that rationale. The Act makes it clear that the "public interest, convenience and necessity" can be advanced by having multiple ETCs receive universal service support, as long as they use that support to provide service "throughout the service area for which the designation is received." 47 U.S.C. § 214(e)(1) & (2).

C. Portability and Competitive Neutrality Are Required by Law

An unbroken line of Court decisions and FCC precedents make it clear that competitive neutrality – and its necessary corollary, fund portability – are statutory mandates, and that disbursing less per-line support to CETCs than to ILECs violates the competitive neutrality principle. The Fifth Circuit made clear in the *Alenco* decision that "portability is not only consistent with predictability, but also is dictated by principles of competitive neutrality and the statutory command that universal service support be spent 'only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended.' 47 U.S.C. § 254(e)."[34] The Fifth Circuit emphatically rejected the premise that ILEC revenue flows must be protected at all costs, and thus that any reductions in disbursements needed to prevent undue fund growth must be borne by CETCs rather than ILECs.[35] This conclusion flows naturally from the Fifth Circuit's earlier decision affirming (in pertinent part) the FCC's original First Report and Order implementing the 1996 Act's universal service provisions: "the old

[34] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000).

[35] *Id.* at 620, 621-22 ("[The rural ILECs'] sufficiency challenge fundamentally misses the goal of the Act. The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.... The purpose of universal service is to benefit the customer, not the carrier. "Sufficient" funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy.... What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act.")

regime of implicit subsidies -- that is, 'the manipulation of rates for some customers to subsidize more affordable rates for others' -- must be phased out and replaced with explicit universal service subsidies – government grants that cause no distortion to market prices – because a competitive market can bear only the latter."[36]

(Importantly, the statutory goal articulated by the Fifth Circuit has not yet been achieved. Policymakers have a long way to go to eliminate implicit subsidies that create undue preferences for ILECs over CETCs and distort the telecommunications marketplace. **Exhibit 2** to these comments is a matrix demonstrating that, for example, in Iowa and South Dakota, ILECs continue to receive massive implicit subsidies through excessive access charges that are unavailable to wireless CETCs. These implicit subsidies inflate ILEC revenues and interfere with wireless carriers' ability to compete on a level playing field.)

Consistent with these court decisions, the FCC, to date, has consistently disallowed "the competitive harm that could be caused by providing unequal support amounts to incumbents and competitors. Unequal federal funding could discourage competitive entry in high-cost areas and stifle a competitor's ability to provide service at rates competitive to those of the incumbent."[37] Accordingly, "federal universal service high-cost support should be available and portable to all eligible telecommunications carriers, and conclude that the same amount of support (*i.e.*, either the forward-looking high-cost support amount or any interim hold-harmless amount) received by an incumbent LEC should be fully portable to competitive providers.... To ensure competitive neutrality, we believe that a competitor that wins a high-cost customer from an incumbent LEC should be entitled to the same amount of support that the incumbent would have received for the

[36] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999) (emphasis in original).

[37] *Federal-State Joint Board on Universal Service*, Ninth Report and Order, 14 FCC Rcd 20432, ¶ 90 (1999) ("*Ninth Report and Order*").

line...."[38] This principle applies with equal force to new entrants that compete with small rural ILECs as well as to ETCs competing with larger ILECs.[39]

The proposed cap on CETC funding would disburse unequal support per line – less support to the CETC than to the ILEC for serving the same customer line – and therefore would deprive CETCs of "the same opportunity to receive universal service support as the incumbent."[40] Under such a system, CETCs "may be unable to provide service and compete with the incumbent in high-cost areas. As the Commission has previously concluded, competitively neutral access to such support is critical to ensuring that all Americans, including those that live in high-cost areas, have access to affordable telecommunications services." The 1996 Act requires the Commission to eliminate barriers to competition, but the proposed restriction on CETC support would impose one: "A new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas."[41]

The proposed funding cap would prevent any CETC from obtaining high-cost support in states where no CETC is currently receiving any support – including Idaho and South Carolina, where Alltel operates and seeks to provide service in high-cost areas but has been unable to

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[38] *Id.*

[39] *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244, ¶ 114 (2001) ("*RTF Order*") ("[P]er-loop equivalent amounts of safety valve support should be portable to competitive eligible telecommunications carriers. According to the principle of competitive neutrality adopted by the Commission and recommended by the Joint Board, universal service support mechanisms and rules should neither unfairly advantage nor disadvantage one provider over another. Consistent with this principle, the Commission implemented the universal service principles in section 254 of the Act to ensure that universal service support is 'portable,' in essence, available to all competing eligible telecommunications carriers."); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd 19613, ¶ 151 (2001) ("*MAG Order*").

[40] *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, 15 FCC Rcd 12208, ¶ 114 (2000) ("*Twelfth Report and Order*").

[41] *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd 15168, ¶ 12 (2000) ("*South Dakota Declaratory Ruling*").

obtain ETC status to date.[42] "[I]n those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC," a policy that precludes the prospective CETC from receiving the support available to the ILEC would have "the effect of prohibiting competitive entry. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition. No competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support."[43] In such a case, "the benefits that may otherwise occur as a result of access to affordable telecommunications services will not be available to consumers in high-cost areas. We believe such a result is inconsistent with the underlying universal service principles set forth in section 254(b) that are designed to preserve and advance universal service by promoting access to telecommunications services in high-cost areas."[44]

In sum, the RD's proposal to distribute unequal support to ILECs and CETCs discriminates unfairly against wireless and other carriers and consumers, flies in the face of an unbroken line of precedents, and cannot be justified under the Act.

II. RURAL AMERICA NEEDS COMPETITIVELY NEUTRAL UNIVERSAL SERVICE

Competition among providers of universal service benefits rural consumers. Conversely, the RD's proposal to impose restrictions on high-cost support for wireless CETCs would harm rural America. The reduction in funding would substantially reduce incentives for wireless

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[42] *See* RD, ¶ 5 & n.17; Appendix B.

[43] *South Dakota Declaratory Ruling*, ¶¶ 12-13.

[44] *Id.*, ¶ 23.

carriers to invest in improving service in high-cost areas, and would degrade wireless service and interfere with broadband deployment in rural America.

Rural Americans benefit substantially from the expansion of wireless service that universal service funding makes possible. Wireless service is critical to economic development in rural America. As the Commission has repeatedly recognized and recently re-emphasized, mobile 911 and E-911 are vital health and safety services, especially for people who frequently have to travel long distances – and they cannot be provided unless adequate service is available through the towers and other wireless infrastructure whose funding depends on universal service support. Rural Americans, like consumers across the country, are increasingly relying on wireless as their primary or their exclusive means of voice telecommunications connectivity. And wireless is the most rapidly expanding platform for providing advanced broadband services to consumers across the country, including in rural areas.

Universal service support is a crucial component of this success story. Wireless CETCs – like every other category of ETCs – are obligated to spend every dollar of funding they receive on facilities and services for which the funding is intended. In the case of wireless CETCs, this requirement is vigorously and strictly enforced by state commissions and the FCC. Unlike ILECs, which use their funds primarily for ongoing operations and maintenance since their networks are largely complete, wireless CETCs such as Alltel are using their funds to build out networks to areas that were previously unserved,[45] to increase the service capacity of cell sites and mobile switches, to fill in coverage holes and "dead spots," and to install network upgrades to accommodate advanced services. In the past, rural consumers could expect good wireless

[45] For example, on the Pine Ridge Reservation in South Dakota, the Tribe estimated that less than 30% of the population had telephone service prior to Alltel's entry into the market as a wireless universal service provider. Today more than 80% of the population on the Pine Ridge reservation has access to wireless telephone service. The vast majority of these consumers are eligible for and are receiving a discounted Lifeline service of only $1 per month.